IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-560

JO ANN EVANS GARDNER,

Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY,

Respondent.

BRIEF FOR PETITIONER

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ERRATA TO BRIEF FOR PETITIONER

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1. At page vi the first citation on the page, "Abercrombe" should read "Abercrombie". The last citation on the page should read, Brunson v. Board of Trustees of School District No. 1, 311 F.2d 107 (4th Cir. 1963), cert. denied, 373 U.S. 933 (1963).

2. At page xii, the second citation on the page should read, Roberts v. Golden Gate Disposal Co., 556 F.2d 588 (9th Cir. 1977), cert. denied sub nom Sunset Scavenger Co. v. Roberts, 46 U.S.L.W. 3219 (1977).

3. At page xv, the fourth citation on the page should read, 28 U.S.C. § 1343(4)(1970). The fifth citation on the page should read, 28 U.S.C. § 2201, 2202 (1970). The sixth citation on the page should read, The Civil Rights Act of 1964, Title VII, § 706, 42 U.S.C. § 2000 e-5 (1970 and Supp. V 1975).

4. At page 15, the fourth line in the last paragraph on the page should read, "a pattern and practice or class action.".

5. At page 25 in the second full paragraph, the sixth line, "what types of order constitute the" should read "what types of orders constitute the".

6. At page 27, in the fifteenth line from the top of the page the word "comtemplation" should read "contemplation".

7. At pages 36-37 in the last three lines on page 36 and the first two lines on page 37, the citation should read, Roberts v. Golden Gate Disposal Co., 556 F.2d 588 (9th Cir. 1977), cert. denied sub nom Sunset Scavenger Co. v. Roberts, 46 U.S.L.W. 3219 (1977).

8. At page 40 in the seventh line in the third paragraph of footnote 13, "pursuant to 28 U.S.C. § 1292(a)(1)" should read "pursuant to 28 U.S.C. § 1291".

9. At page 42, the citation in the eighteenth line, "Abercrombe" should read "Abercrombie".

Petitioner apologizes for any inconvenience to the Court occasioned by our delay in identifying these errors.

Respectfully submitted,

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I.

OPINIONS BELOW

The opinion dated June 6, 1977 of the United States Court of Appeals for the Third Circuit, the order denying the petition for rehearing and the dissenting opinion sur denial of petition for rehearing dated July 22, 1977 are officially reported at 559 F.2d 209 (3rd Cir. 1977).

The opinion dated February 3, 1976 of the district court denying class action certification has not been officially reported. (It is printed in the Appendix to the Petition for a Writ of Certiorari at pages 34a through 40a.)

II.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment and opinion of the United States Court of Appeals for the Third Circuit dated June 6, 1977. A petition for rehearing was denied by the United States Court of Appeals for the Third Circuit by order entered July 22, 1977. On October 14, 1977, a petition for a writ of certiorari was filed, invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1)(1970). This Court granted the petition for a writ of certiorari by order dated December 5, 1977.

III.

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1)(1970) provides:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court"

Rule 23 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 23, 28 U.S.C. is set forth in full at 1a - 6a, infra.

IV.

STATEMENT OF THE QUESTION PRESENTED

In an employment discrimination action instituted under Title VII of the Civil Rights Act of 1964, where a class-wide permanent injunction is the primary relief sought; is the denial of a motion to certify a system-wide class immediately appealable as an interlocutory order refusing an injunction pursuant to 28 U.S.C. § 1292(a)(1)?

V.

STATEMENT OF THE CASE

A. Proceedings in the District Court

1. Complaint

The instant action was commenced by the filing of a complaint in the United States Court for the Western District of Pennsylvania on May 29, 1975 (A. 1a, 6-17a).[1/] Federal jurisdiction was grounded on Section 706 of Title VII of the Civil Rights Act of 1964, (hereinafter "Title VII"), 42 U.S.C. § 2000e-5 (1970 and Supp. V 1975); 28 U.S.C. § 1343(4)(1970); 28 U.S.C. §§ 2201, 2202 (1970) (A. 6a).[2/]

1/ The designation "A." refers to the Appendix filed in this Court and the designation "P." refers to the Appendix to the Petition for a Writ of Certiorari; any references to the original record not included in the Appendix will be preceded by the designation "R.".

2/ The complaint also included a pendent state claim under Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania (A. 13a-14a).

Statement of the Case

The named plaintiff, Jo Ann Evans Gardner (hereinafter "Gardner") claimed that Westinghouse Broadcasting Company, (hereinafter "Westinghouse") maintained and continues to maintain a policy, practice, custom and usage of discrimination against females as a class in violation of Title VII and Article I Section 27 of the Constitution of the Commonwealth of Pennsylvania. (A. 7a-8a, 10a-11a, 13a-14a, 15a-16a)

Gardner, an unsuccessful applicant for employment as a radio talk show host, stated that she had fulfilled the administrative prerequisites to filing an action in federal court (A.-1a, 12a-13a, 16a-17a).[3/]

3/ The complaint reveals that Gardner filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") within the time period specified by Section 706 of Title VII, 42 U.S.C. § 2000e-5. Thereafter, the EEOC issued a determination of reasonable cause and a notice informing Gardner of her right to file a civil action. Gardner instituted this action within ninety (90) days of her receipt of that notice (A. 1a, 12a-13a, 16a-17a).

Statement of the Case

Under the authority of Fed. R. Civ. P. 23, Gardner brought the action on her own behalf and on behalf of a class of females adversely affected by Westinghouse's discriminatory employment practices. The perimeters of the putative system-wide class were described in the complaint as: past, present and future female employees; unsuccessful female applicants; females deterred from applying to Westinghouse by its reputation in the community for denying equal employment opportunity; and females who will not in the future be considered for certain positions on account of their sex (A. 8a-9a, 11a-12a). The class members were described as being aggrieved by Westinghouse's alleged policy and practice of maintaining sex segregated job classifications; failing to hire, promote, and assign females on the same basis as males; failing to accord females equal consideration for employment and equal opportunities; and maintaining a posture of denying equal opportunity which effectively discouraged females from seeking employment (A. 10a-11a, 16a-17a).

Because she and the class had no complete or adequate remedy at law, and were suffering and would continue to suffer from Westinghouse's discriminatory practices, the primary relief requested by Gardner on her own behalf and on behalf of the class was a permanent injunction to prevent Westinghouse from continuing to abridge her and the class' rights (A. 13a-14a). Gardner also sought ancillary relief to require Westinghouse to make all affected females whole by back pay and otherwise and to pay reasonable attorneys' fees (A. 14a-15a).

2. Motion to Determine a Class Action and Discovery

In accordance with the requirements of Fed. R. Civ. P. 23(c)(1) and Local Rule 34(c) of the Rules of Court of the United States District Court for the Western District of Pennsylvania, Gardner filed a motion to determine a class within ninety (90) days of the filing of the complaint (A. 1a, 22a-24a), requesting the district court to certify a class pursuant to Fed. R.

Civ. P. 23(b)(2) following the completion of discovery (A. 24a). Simultaneously therewith, Gardner propounded interrogatories to Westinghouse, dealing solely with the class certification issue, to enable her to present evidence of the scope of the proposed class (A. 167a-173a). Westinghouse, which owns and operates seven (7) radio stations throughout the United States, refused to answer all interrogatories which sought information as to any radio station apart from station KDKA in Pittsburgh. (A. 26a-31a, 36a-38a, 107a, 115a) Thereupon, Gardner filed a motion to compel discovery in order to obtain complete answers to the interrogatories regarding the numbers of persons who have applied, have been hired, have been employed, and have been discharged in all of Westinghouse's radio stations (A. 2a, 162a-174a).

3. Opinion and Order of the District Court

On October 30, 1975, the Honorable Barron P. McCune held oral argument on both the motion to determine a class and

the motion to compel discovery (A. 1a, 175a-220a). By memorandum and order dated February 3, 1976, Judge McCune denied both motions. The ruling on the motion to compel discovery was the direct result of the unconditional decision to deny class certification (A. 3a, 221a, P. 40a). Denial of class status was predicated on Judge McCune's view that the requirements of Fed. R. Civ. P. 23 (a)(2), (a)(3), and (a)(4) had not been satisfied; a conclusion which he reached by comparing the nature of Gardner's individual claim on the merits with the nature of the class' substantive claims (P. 35a-39a).[4/]

4. Proceedings in the Court of Appeals

On her own behalf and on behalf of the class she sought to represent,

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4/ In sum, Judge McCune found Gardner's claim to be unique, because the facts necessary to establish it would differ from those surrounding different employment decisions in different job classifications (P. 37a-39a).

Gardner filed a notice of appeal from Judge McCune's order on February 25, 1976 (A. 3a, 222a). Westinghouse filed a motion to dismiss appeal for lack of jurisdiction, and Gardner responded (A. 3a). After initially denying Westinghouse's motion, Judges Adams and Forman of the United States Court of Appeals for the Third Circuit referred the jurisdictional question to a merits panel of the court (A. 4a).

In support of her right to maintain this appeal Gardner argued, inter alia, that the denial of class certification amounted to the effective denial of the broad injunctive relief sought on behalf of the class and, therefore, constituted an order of immediate and irreparable consequence which was appealable pursuant to 28 U.S.C. § 1292(a)(1)(1970). (R., Response to Appellee's Motion to Dismiss Appeal)

The Third Circuit rejected Gardner's argument, stating that denial of class certification does not constitute the absolute refusal of an injunction and that no immediate or irreparable consequences flow from a postponement of review (A. 223a-224a). It

accordingly granted Westinghouse's motion to dismiss the appeal on June 6, 1977 (A. 4a, 225a-226a).

Gardner timely filed a petition for rehearing which was denied on July 22, 1977. Judge Gibbons dissented and Judge Adams joined in the dissent.

The instant petition for a writ of certiorari was filed on October 14, 1977, and this Court granted the petition by order dated December 5, 1977.

VI.

SUMMARY OF ARGUMENT

The Third Circuit erred in refusing to hold that the unconditional denial of class action status in a Title VII action where a broad permanent injunction was the primary relief sought on behalf of the class was appealable as an interlocutory order refusing an injunction pursuant to 28 U.S.C. § 1292(a)(1). This Court has not ruled on the appealability of a class action order in this context, but federal appellate courts have found that the denial of class action status amounts to the refusal of an injunction.

The Third Circuit failed to recognize that the district court's denial of a class action effectively precluded the class members from obtaining any relief. The refusal of class certification stripped the case of its character as a class action.

This Court has long recognized that 28 U.S.C. § 1292(a)(1) is applicable even where a motion for an injunction has not been expressly granted or denied; the effective denial of the

injunction, which inherently has serious and irreparable consequences is the touchstone of appealability e.g., an order effectively limiting the scope of injunctive relief.

The Third Circuit erred in concluding that the class action decision is "purely procedural" for a class action determination, involving as it does a comparison of the substantive claims of the individual plaintiff with those of the class members, "touches on the merits" and finally restricts the scope of relief which the named plaintiff can ultimately obtain.

The Third Circuit ignored the danger that the postponement of review of the class denial until the conclusion of the action will work a denial of justice. If the representative plaintiff loses his or her individual claim on the merits, he or she is no longer a member of the class and thus loses his or her standing. Should the representative plaintiff succeed on the merits of the individual case and obtain all the relief requested, he or she loses the

incentive to appeal the class action decision. Unless the putative class members are aware of the status of the case and intervene in time, the putative class members may suffer a loss of the right to bring individual actions.

Immediate appealability of an erroneous class action decision fosters the policies underlying Fed. R. Civ. P. 23 and Title VII. This Court has recognized that Congress, through the 1972 amendments to Title VII, clearly indicated that Title VII actions are inherently class actions. Efficiency, and the furtherance of private enforcement of the congressional policy against discrimination are fostered by the class action device. The practical result of non-appealability is a waste of judicial time which is contrary to congressional intent.

The elements of the prima facie case and order of proof in an individual case differ from those necessary to establish a pattern or class action. Thus, the denial of a class action affects the scope of evidence both for

discovery and at trial. Ultimate reversal of a class denial will necessarily cause a remand to retry the case with a different scope of discovery and trial evidence.

The denial of a permanent injunction is as appealable under 28 U.S.C. § 1292(a)(1) as that of a preliminary injunction; the denial of a permanent injunction can be an interlocutory order.

VII.

ARGUMENT

IN AN EMPLOYMENT DISCRIMINATION ACTION INSTITUTED UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, WHERE A CLASS-WIDE PERMANENT INJUNCTION IS THE PRIMARY RELIEF SOUGHT; THE DENIAL OF A MOTION TO CERTIFY A SYSTEM-WIDE CLASS IS IMMEDIATELY APPEALABLE AS AN INTERLOCUTORY ORDER REFUSING AN INJUNCTION PURSUANT TO 28 U.S.C. § 1292(a)(1).

A. Injunctive Relief is the Heart of the Remedy Sought in the Complaint

The complaint filed in the instant action reveals that it is an "across the board" attack on all of Westinghouse's system-wide employment practices which adversely affect females. Gardner challenges hiring, assignment, promotion, and discharge policies which adversely effect women.[5] On her own

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[5] The "across the board" concept allows a person aggrieved by one aspect of an employer's discriminatory employment policies to challenge as a private attorney general all of the practices which manifest discrimination even though that person has not personally experienced all practices. Senter v. [Footnote Continued On Next Page]

behalf and on behalf of the class, Gardner seeks affirmative relief in the form of a permanent injunction to prohibit policies and practices which violate Title VII. To establish her right to such relief, Gardner alleges that she and the class have no adequate remedy at law and that a permanent injunction is the only means by which they can redress the irreparable injury which they have suffered and continue to suffer as a result of Westinghouse's actions. See p.8, supra.

In a number of cases federal appellate courts have found, particularly in civil rights actions, that injunctive relief is the primary relief sought. Jones v. Diamond, 519 F.2d 1090 (5th

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5/ (continued)
General Motors Corp., 532 F.2d 511 (6th Cir. 1976), cert. denied, 429 U.S.870 (1977); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Barnett v. W. T. Grant Company, 518 F.2d 543 (4th Cir. 1975); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

Cir. 1975) (preliminary and permanent injunction to end violations of constitutional rights in the penal system); Yaffee v. Powers, 454 F.2d 1362 (1st Cir. 1972) (injunctive relief to end surveillance of political protesters); Brunson v. Board of Trustees of School District No. 1, 311 F.2d 107 (4th Cir. 1963), cert. denied, 373 U.S. 933 (1963) (general injunction to achieve county-wide school desegregation); compare, Williams v. Wallace Silversmiths, Inc., _____ F.2d _____, 13 E.P.D. ¶ 11,556 (2nd Cir. 1977) (Title VII case seeking primarily monetary relief); Weit v. Continental Illinois National Bank and Trust Company of Chicago, 535 F.2d 1010 (7th Cir. 1976) (antitrust class action against banks for conspiracy in setting interest rates).

The Third Circuit totally ignored the fact that Judge McCune's order denying the motion to determine a class effectively limited the system-wide injunction which was the heart of the relief sought by Gardner and which alone would have completely abolished Westinghouse's discriminatory employment practices.

B. The Denial of Class Certification Strips the Case of its Character as a Class Action

Fed. R. Civ. P. 23(c)(1) provides as follows:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

The Advisory Committee notes to this aspect of Fed. R. Civ. P. 23 state that while the grant of a class action may well be conditional and altered in the future, the denial of class status clearly is not; and, upon refusal to certify, the action should be stripped of its character as a class action. Federal Rules Advisory Committee, Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 104 (1966). This court has recognized this result of the denial of class status in United Airlines, Inc. v. McDonald, _____ U.S. _____, 97 S.Ct. 2464 (1977):

> "To be sure, the case was 'stripped as its character as a class action' upon denial of certification by the District Court. [Citations omitted]" Id. 97 S.Ct. at 2469.

By its decision, the Third Circuit myopically failed to see the finality inherent in the district court's denial of class certification in the instant case.

C. 28 U.S.C. § 1292(a)(1) Applies Where an Injunction is Effectively Denied

1. This Court's Decisions Construing the Statute

The statute at issue herein, 28 U.S.C. § 1292(a)(1)(1970), had its origins in an 1891 act which established the jurisdiction of the federal appellate courts. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955) (hereinafter "Baltimore Contractors, Inc."). In a line of cases construing the present statute and its predecessors, this Court has consistently

held that, to be appealable, an order need not expressly grant, deny or modify an injunction.[6] In General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932) (hereinafter "General Electric"), the dismissal for lack of jurisdiction of a counterclaim praying for an injunction was held appealable pursuant to the predecessor of 28 U.S.C. § 1292 (a)(1):

> ". . .But by their motion to dismiss, plaintiffs themselves brought on for hearing the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction. That is, whether the allegations of the answer are sufficient to constitute a cause of action for injunction. And the court necessarily decided upon the facts alleged in the counterclaim defendants were not entitled to an injunction. It cannot be said, indeed

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6/ This Court has similarly given a practical non-technical construction to orders appealed pursuant to 28 U.S.C. § 1291. Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

> plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer. ..." Id. at 433 (Emphasis added)

In Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935) (hereinafter "Enelow"), this court found the denial of an injunction where the district court had granted a stay of an action at law so that an equitable defense thereto could be first tried. The district court order effectively granted or refused an injunction restraining proceedings at law "precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose". Id. at 383. In 1935, in a decision compelled by the holding in Enelow, supra, this court concluded that the district court's denial of a motion for a stay of proceedings pending arbitration constituted an appealable order. Shanferoke Coal and Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935).

In Ettelson v. Metropolitian Life Insurance Co., 317 U.S. 188 (1942) (hereinafter "Ettelson"), the district court's stay of an action at law on an insurance policy so that a counterclaim raising an equitable defense and seeking an injunction could first be tried constituted the postponement of the trial on the policy and as a practical matter terminated that action. Therefore, it was "as effective in these respects as an injunction issued by a chancellor". Id. at 192. This Court stated:

> "The relief afforded by section 129 [predecessor to present 28 U.S.C. § 1292(a)(1)] is not restricted by the terminology used. The statute looks to the substantial effect of the order made. [Citations omitted]" Id. at 192.

The opinion in Baltimore Contractors, Inc., supra, surveyed the legislative history of 28 U.S.C. § 1292(a)(1):

> "No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem

> plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence. ..." Id. at 181.

It is self-evident from the above that, since the grant, denial or modification of an injunction is the essence of 28 U.S.C. § 1292(a)(1) an order granting, denying or limiting such equitable relief is inherently an order of serious, perhaps irreparable consequence.

Moreover, Baltimore Contractors, Inc., supra, does not depart from the previous cases' emphasis on the "substantial effect of the order made". Id. at 183. In an effort to define what types of order constitute the effective grant or denial of an injunction, this Court contrasted orders granting or denying equitable remedies, George v. Victor Talking Machine Co., 293 U.S. 377 (1934) (hereinafter "George"), Enelow, supra, and Ettelson, supra, with rulings which are merely steps in controlling the litigation

before the federal court. Baltimore Contractors, Inc., supra, supports the exercise of appellate jurisdiction herein, since the order denying class certification, like the orders in George, supra, Enelow, supra, and Ettelson, supra, effectively denies equitable relief. Because the appellate court's power to review this order is plainly within the letter and the spirit of 28 U.S.C. § 1292(a)(1), no judicial expansion of the statute will be required in order to hold the class denial, sub judice, a denial of an injunction.[7]

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[7] While the factual situation presented in Baltimore Contractors, Inc., supra, coupled with the technical distinction between law and equity played a significant role in this Court's decision to deny appellate jurisdiction therein, the holding does not argue against the appealability of the order at issue in this case. The precedential effect of Baltimore Contractors, Inc., supra, is limited by this Court's explicit recognition of the extent to which the precise holding is controlled by the "persistence of outmoded procedural differentiations", Id. at 184, which are not present in the case sub judice.

Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) (hereinafter "Switzerland Cheese") does not destory the appealability of orders which, like the class action denial in the instant case, affectively deny injunctive relief. Switzerland Cheese merely held that an order denying a motion for summary judgment on the ground that there remained a genuine issue of material fact in a case where a permanent injunction was sought did not amount to an interlocutory order refusing an injunction within the comtemplation of 28 U.S.C. § 1292(a)(1). This decision is obviously not apposite to the case sub judice, where the district court's denial of class action status prevents the putative class members from obtaining any injunctive relief whatsoever. Like General Electric, supra, Enelow, supra, and Ettelson, supra, the order complained of herein did dispose of a demand for injunctive relief. On the contrary, however, the order in Switzerland Cheese, like that in City of

Morgantown, West Virginia v. Royal Insurance Co., 337 U.S. 254 (1949) did not affect the ultimate remedy which could be obtained by the litigants but rather decided only the manner in which the case should be tried. As this Court stated in Switzerland Cheese, supra:

> ". . . the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing--that the case should go to trial. ..." Id. at 25.

Thus, while assumption of jurisdiction in Switzerland Cheese would have required an expansion of 28 U.S.C. § 1292(a)(1), the assumption of jurisdiction over orders denying class certification in civil rights cases where

injunctive relief is sought will not.[8]

The Third Circuit engaged in an unwarranted expansion and misapplication of Switzerland Cheese by focusing on the language therein relating to pre-trial procedures and thereby failing to realize that the class action decision below finally and effectively denied injunctive relief to the members of the potential class. A class action denial in a case where injunctive relief is the primary remedy sought is not a mere pre-trial procedure.

Further, Judge McCune's decision below did "touch on the merits", and in

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8/ In Goldstein v. Cox, 396 U.S. 471 (1970), Mr. Justice Marshall limited the holding in Switzerland Cheese to its facts:

> "In Switzerland Cheese Ass'n., supra, this Court left open the question whether an order denying summary judgment might be appealable as an order denying an injunction when the ground for the denial was other than the existence of a triable issue of fact." Id. at 475 n. 2.

so doing illustrated the common practice of comparing the substantive claims of the representative plaintiff with those of the class in order to determine whether the requirements of Fed. R. Civ. P. 23(a)(2), (a)(3) and (a)(4) have been satisfied. See p.10, supra; Huff v. N. D. Cass Co. of Alabama, 485 F.2d 710 (5th Cir. 1973); Wells v. Ramsay, Scarlett and Co., 506 F.2d 436 (5th Cir. 1974); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974). The determination of whether or not a case should proceed as a class action often implicates the merits of the underlying cause of action. Lamphere v. Brown University, 553 F.2d 714 (1st Cir. 1977).9/

9/ However, courts which rely on the overlap between the aspects of Fed. R. Civ. P. 23 and the merits of the substantive case in justifying their refusal to certify class actions often violate Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177-178 (1974).

The order sought to be appealed in this case thus falls squarely within the perimeter of 28 U.S.C. § 1292(a)(1) and the cases interpreting the statute in this Court, and no judicial expansion of the statute would result.

D. The Order Denying Class Certification in a Title VII Case Where Broad Injunctive Relief is Sought Effectively Limits the Scope of the Injunction Which Can Ultimately be Granted, and Constitutes the Denial of That Injunction.

1. The Unconditional Denial of Class Certification Eliminated the Broad Injunctive Relief Sought

When a district court refuses to certify a case as a class action, that decision strips the case of its character as a class action. Fed. R. Civ. P. 23(c)(1); United Airlines, Inc. v. McDonald, supra; Federal Rules Advisory Committee, Note to Proposed Amendments to Rule 23, supra. The district court's order herein was unconditional in language and repudiated the "across the board" concept which Gardner espoused in

her complaint and in her briefs and argument before the lower court. Combined with the denial of the motion to compel discovery, the failure to grant class certification foreclosed Gardner from obtaining through discovery and presenting at trial any evidence of Westinghouse's employment practices, except as they relate to Gardner's individual case. See p.53-54, infra. Therefore, it will be impossible for Gardner to prepare the record for any injunctive relief which will benefit any female except Gardner. See e.g., Rich v. Martin Marietta Corp., supra; Brunson v. Board of Trustees of School District No. 1, supra.

2. The Scope of Relief Which Can be Obtained After Class Certification is Denied is Limited to That Which Will Remedy the Title VII Violation for Gardner Alone

Absent compliance with Fed. R. Civ. P. 23 and certification thereunder, the individual plaintiff can obtain no greater relief than that to which he or she is individually entitled. Sperry Rand Corp. v. Larson, 554 F.2d 868 (8th

Cir. 1977); Carracter v. Morgan, 491 F.2d 458 (4th Cir. 1973); Washington v. Safeway Corp., 467 F.2d 945 (10th Cir. 1972); Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971); see also, Equal Employment Opportunity Commission v. D. H. Holmes Company, Ltd., 556 F.2d 787 (5th Cir. 1977). This Court's recent discussion of the evidence to be presented during the remedial phase of a Title VII case, International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977), and its discussion of the requirements of Fed. R. Civ. P. 23 in East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977); support the concept that a court's power to award broad class-wide "make whole" relief under Section 706 of Title VII, 42 U.S.C. § 2000e-5 can be exercised only to the extent that the proper predicate is established by the

plaintiff(s) and a proper class action is established.[10]

10/ Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971) (herein after "Sprogis") is not to the contrary. The instant case does not involve a company-wide rule or policy where relief granted in favor of the named plaintiff will perforce operate to the benefit of the class, such as would result if a "no marriage" rule or preemployment testing procedure was at issue. The essence of the "across the board" class action is that a permeating policy of discrimination pervades employment decisions which may and do involve different factual complexes. Senter v. General Motors Corp., supra; Johnson v. Georgia Highway Express, Inc., supra.

Even in Sprogis, supra, a case challenging a "no marriage" rule, Mr. Justice Stevens stated as follows:

> "Nor can I find any basis in Rule 23 of the Federal Rules of Civil Procedure for permitting an individual claim to be converted into a class action after a decision

[Footnote Continued on Next Page]

Since the order refusing to certify a class action in the case sub judice finally and effectively denied the injunctive relief to the putative class members and effectively limited the injunctive

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10/ (continued)
on the merits. . . At a minimum, this rule [i.e., Fed. R. Civ. P. 23(c)(1)] requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or back pay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair." Id. at 1207.

Thus the district court's authority pursuant to 42 U.S.C. § 2000e-5 to grant such relief as is necessary to eradicate discrimination is limited by the procedural rules, especially by Fed. R. Civ. P. 23.

relief which Gardner herself can eventually obtain, it is appealable under 28 U.S.C. § 1292(a)(1). See, Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976).

3. Four Circuits Within the Federal Appellate System Have Expressly Held That Orders Denying Action Certification Are Appealable in Civil Rights Actions.

Four circuits within the federal appellate system have explicitly recognized that an appeal lies from an order denying class action status in a civil rights case where such decision effectively limits the scope of the broad injunctive relief sought. Yaffee v. Powers, supra; Doctor v. Seaboard Coastline Railroad Co., 540 F.2d 699 (4th Cir. 1976); Brunson v. Board of Trustees of School District No. 1, supra; Jones v. Diamond, supra; Roberts v. Golden Gate Disposal Co., 556 F.2d 588 (9th Cir. 1977), cert. denied,

sub. nom. Roberts v. Sunset Scavenger Co., 46 U.S.L.W. 3219 (1977); Gay v. Waiters' and Dairy Lunchmens' Union Local No.30, 549 F.2d 1330 (9th Cir. 1977); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9th Cir. 1975); Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974).[11/]

The Seventh Circuit will review appeals from an order denying class action status where the order is issued in conjunction with the ruling on a preliminary injunction. Jenkins v. Blue Cross Mutual Hospital Insurance Co., 538 F.2d 164 (7th Cir. 1976), cert. denied, 429 U.S. 986 (1976).

11/ The Eighth Circuit has expressly refused to adopt or reject this theory of appealability for class action orders. Johnson v. Nekoosa-Edwards Paper Co., ____ F.2d ____, 14 FEP Cases 1658 (8th Cir. 1977); Donaldson v. Pillsbury Co., 529 F.2d 979 (8th Cir. 1976).

The courts of appeals which have held that orders refusing to certify class actions in civil rights cases are appealable understand, as the Third Circuit did not, that such orders effectively, finally, and totally deny or narrow considerably the scope of any injunctive relief which the named plaintiff could ultimately obtain if he or she succeeds on the merits. Yaffee v. Powers, supra.[12/]

12/ The Second and District of Columbia Circuits in addition to the Third Circuit have refused to allow appeals from class action denials in employment discrimination actions. Williams v. Wallace Silversmiths, Inc., supra; Williams v. Mumford, 511 F.2d 363 (D.C. Cir. 1975), cert. denied, 423 U.S. 828 (1975).

The former case is distinguishable on the grounds that the Second Circuit found that injunctive relief was not the heart of the relief sought. Williams v. Mumford, supra, narrowly construes Switzerland Cheese supra, as did the Third Circuit.

However, on application for rehearing before the court in banc, Judge Spottswood W. Robinson of the
[Footnote Continued on Next Page]

The theory which emerges from the above cases is that where the substantial effect of the court's order denying class action status "is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits . . . the order is appealable as a denial of the broad injunctive relief sought. ..." Yaffee v. Powers, supra at 1364.[13/]

12/ (continued)
District of Columbia Circuit offered a strong statement of dissent on his own behalf and on behalf of three other judges. The dissent recognized the central importance of the class action and the chilling effect which nonappealability of class action denials, save in limited circumstances, will have on the continued viability of Fed. R. Civ. P. 23.

13/ At the time the instant appeal was filed in February,1976, the Third Circuit apparently followed the line of cases upholding appealability. Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972).
[Footnote Continued on Next Page]

The Fourth Circuit delineated the conditions under which a denial of class

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13/ The Third Circuit deliberately closed this avenue of appeal in its opinion below (P.4a-5a).

Since the Third Circuit had also consistently held that the denial of class certification is not appealable as a final order under either the collateral order or "death knell" doctrines, Hackett v. General Host. Corp., supra, Gardner accordingly filed her notice of appeal pursuant to 28 U.S.C. § 1292(a)(1).

However, should the order refusing class certification be deemed unappealable under 28 U.S.C. § 1292 (a)(1), it is respectfully requested that this Court consider the appealability of the order pursuant to 28 U.S.C. § 1292(a)(1) See, Liberty Mutual Insurance Co. v. Wetzel, supra; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Gillespie v. U.S. Steel Corp., supra; Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106 (8th Cir. 1977), cert. granted, 46 U.S.L.W. 3145 (1977)

action certification will be appealable pursuant to 28 U.S.C. § 1292(a)(1), i.e., where the "class action bears a symbiotic relationship to the frustration of relief . . ." Jones v. Diamond, supra at 1095:

> "The first, and perhaps obvious, requirement is that the plaintiff's prayer for an injunction must constitute the heart of the relief he seeks. The desired injunction must be capable of resolving the substantive issues of the claim; it cannot merely maintain the status quo during the litigation. . . . [citations omitted]
>
> "The second requirement for appealability is that the practical result of the order denying the proposed class must be to deny the requested broad injunction. . . .
>
> We therefore hold that where the denial of permission to proceed as a class is synonymous with the denial of the broad injunctive relief sought on the merits, and where the injunction is the primary purpose of the suit, the order is appealable under section 1292(a)(1) as an order 'refusing' an injunction."

Id. at 1095-1097 (Emphasis added)

In cases where injunctive relief is requested, orders other than those dealing with class action certification have been held appealable under 28 U.S.C. § 1292(a)(1) on the theory that they have the effect of limiting injunctive relief: Melindez v. Singer Friden Corp., 529 F.2d 321 (10th Cir. 1976) (dismissal by summary judgment of Title VII claim limiting plaintiff to relief under 42 U.S.C. § 1981); Scarrella v. Midwest Federal Savings and Loan, 536 F.2d 1207 (8th Cir. 1976), cert. denied, 429 U.S. 885 (1976) (dismissal of parties); Martinez v. Mathews, 544 F.2d 1233 (5th Cir. 1976) (order that an interim policy board be elected); Abercrombe & Fitch Co. v. Hunting World, Inc., 461 F.2d 1040 (2nd Cir. 1972) (partial grant of summary judgment in trademark infringement action requesting injunction against all uses of the word "safari"); Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2nd Cir. 1971) (dismissal of several defendants in an action seeking to end unconstitutional, systematic pattern of abusive police practices); Spangler v. U.S.,

415 F.2d 1242 (9th Cir. 1969) (order striking allegations in United States' complaint in intervention seeking school desegregation in units of the school system other than those attended by the original individual plaintiffs).

The Third Circuit refused to follow substantial judicial authority which, in considering the appealability of orders effectively denying or limiting injunctive relief, held that those orders are immediately appealable as interlocutory orders refusing injunctions.

E. The Denial Of Class Certification Is Inherently An Order Of Serious And Irreparable Consequence.

The Third Circuit, in focusing on whether the "delay in review will work an injustice" (P. 6a; Court's emphasis) applied one prong of the balancing test which this Court has utilized in determining whether a marginally final order can be appealed pursuant to 28 U.S.C. § 1291. Gillespie v. United States Steel Corp., supra; Dickenson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). However, it is the purpose of 28 U.S.C. § 1292(a)(1) to allow interlocutory appeals where an order of

serious and irreparable consequence; i.e., an injunction, has been granted, denied, or modified.[14] It is the inherent and immediate irreparable effect of that order which, Congress recognized, provides the necessity for an appeal without delay. Baltimore Contractors, Inc., supra. Gardner and the class premised their demand for a permanent injunction on the inadequacy of legal remedies to arrest the irreparable harm they suffer as a result of Westinghouse's employment practices. An analysis of the consequences of a delay in review until final judgment therefore has no applicability to a case properly appealed pursuant to 28 U.S.C. § 1292 (a)(1).

Nonetheless, it is important to note the consequences of the failure to certify a class action in an employment discrimination action, for to do so

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14/ The presence of irreparable harm because of the inadequacy of legal remedy is of course, the sine qua non of an injunction. O'Shea v. Littleton, 414 U.S. 488 (1974); Younger v. Harris, 401 U.S. 37 (1971).

underscores the importance of the interlocutory appeal in these cases. Not only did the Third Circuit refuse to see the denial of class status for what it was; the final denial of a permanent injunction, but it also refused to analyze the crucial effect of the district court's order on the future conduct of the case.

1. Standing and Lack of Incentive to Appeal

Where a class action is not certified and subsequently the representative plaintiff loses his or her individual Title VII claim on the merits, this Court's recent decision in East Texas Motor Freight System, Inc. v. Rodriguez, supra suggests that no class could subsequently be certified, at least at the behest of the original class representative, despite the presence of a wholly erroneous district court decision on the maintainability of the case as a class action. Since the representative plaintiff must be a member of the class he or she seeks to represent at the time of certification,

the failure of the individual claim would be dispositive. Moreover, it is probable that an appeal challenging the merits of a district court order denying class certification brought by the class representative following the loss of his or her individual case would be dismissed as not presenting the appellate court with a concrete case or controversy in violation of Article III of the Constitution of the United States. See, East Texas Motor Freight System, Inc. v. Rodriguez, supra; Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Sosna v. Iowa, 419 U.S. 392 (1975); Board of School Commissioners of the City of Indianapolis v. Jacobs, 420 U.S. 128 (1975); Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976); Accord, Napier v. Gertrude, 542 F.2d 825 (8th Cir. 1976); Contra, Satterwhite v. City of Greenville Texas, 557 F.2d 414, (5th Cir. 1977), reh. granted, 563 F.2d 147 (5th Cir. 1977).[15/]

15/ The dissenting opinion filed in Satterwhite, supra, indicates that the panel opinion may well contravene this court's decision in East Texas Motor Freight System, Inc. v. Rodriguez, supra.

The denial of an immediate appeal from the refusal to certify a class action may well foreclose an appeal on the merits of that decision at any time. Should an appeal be allowed, it may result in an empty victory for the putative class where only a single representative has brought the action and that representative cannot subsequently be certified as the class representative because of the loss of the individual case.

Under United Airlines, Inc. v. McDonald, supra, and American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) the Title VII statute of limitations will be tolled for putative class members at most until an appellate court has reviewed the lower court's decision on class certification. Individuals who are unaware of the precise moment when the appellate process concludes will not have exhausted their administrative remedies, and they will therefore be unable to institute another class action or individual actions should an appellate

court uphold the district court's denial of class certification. While a class member in a Title VII suit need not exhaust administrative remedies, the class representative or plaintiff in an individual action clearly must do so prior to instituting the action. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). Ignorance of the status of the class action and failure to exhaust administrative remedies will result in the loss of the right to litigate many potential claims.

Moreover, if the representative plaintiff succeeds on the merits after the district court denies class certification and obtains all of the relief to which he or she is entitled; he or she will, undoubtedly, have no incentive to appeal the class action decision because the reversal of class determination will inevitably lead to a new trial of the action with a different scope of evidence and discovery. Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364 (7th Cir. 1976), cert. denied, 429 U.S. 907 (1976) (dissenting opinion); See, e.g., McDonald

Douglas Corp. v. Green, 411 U.S. 792 (1973); International Brotherhood of Teamsters v. U.S., supra.

While the putative class members could attempt to intervene to appeal the refusal to certify the class, United Airlines, Inc. v. McDonald, supra, such intervention would be rare due to lack of knowledge that a class action had been instituted and lack of awareness of the progress of the litigation. In the case at bar, potential class members residing in cities other than Pittsburgh will have virtually no opportunity to learn of the status of the action. Should Gardner have proceeded directly to a trial on the merits of her individual case instead of filing this appeal, and should she obtain satisfactory relief and choose not to appeal the class action determination; it is extremely probable that Judge McCune's decision will never be reviewed to the detriment of the putative class.

2. Public Policy Underlying Title VII and Fed. R. Civ. P. 23

The class action decision which is

clearly fundamental to the future conduct of any action has a special importance in the Title VII case. The Advisory Committee Notes to Fed. R. Civ. P. 23(b)(2) indicate that the subsection was intended to reach situations:

> "where a party has taken action or refused to take action with respect to a class and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. ...
>
> Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. ..." Federal Rules Advisory Committee, Notes to Proposed Amendments to Rule 23, supra at 102.

In enacting the 1972 Amendments to Title VII, Congress was keenly aware of the development of the use of the class action in the courts. In providing for private enforcement under Section 706, 42 U.S.C. § 2000e-5, Congress

did not intend that the class action device should be affected. As the House report read into the Congressional Record during the debate on the 1972 Amendments stated:

> "The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. ..."
> 118 Cong. Rec. 7565 (1972) (Emphasis added) 16/

16/ In East Texas Motor Freight System, Inc. v. Rodriguez, supra, the Court indicated its awareness that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving class wide wrongs. ..." Id. at 405.

This Court relied on the above legislative history in Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 n.8 (1975), in broadly construing the remedial provisions of Title VII in class action cases.

Where class certification in Title VII cases is capriciously denied as a result of district court inhospitability to the device and to Title VII, Congressional policy is violated. There is an urgent need for appellate court supervision of class action determinations. The nonappealability of class action denials will, as Judge Robinson recognized, have a chilling effect on the class action. Williams v. Mumford, supra (dissenting opinion by Robinson, J.). In view of the inextricable interweaving of Title VII and Fed. R. Civ. P. 23, nonappealability under § 1292(a)(1) will have a synergistic chilling effect on Title VII rights.

3. Expense Resulting From the Differing Elements of Proof in Title VII Individual and Class Actions.

In considering whether to allow

piecemeal review of marginally final orders, this Court has given weight to the expense attendant upon the decision not to allow an appeal from an order which is fundamental to the further conduct of a case. U.S. v. General Motors Corp., 323 U.S. 373 (1945); See, Baltimore Contractors, Inc., supra (dissenting opinion by Black, J.).

The scope of evidence and the elements of the burden of proof in an individual action under Title VII differ markedly from those in a pattern and practice or class action thereunder. Compare, McDonald Douglas Corp. v. Green, supra; Franks v. Bowman Transportation Co., supra; International Brotherhood of Teamsters v. United States, supra. When class action status is denied, the focus of the substantive case shifts to an emphasis on the individual plaintiff's claim on the merits. If an appellate court finds the class action decision to be erroneous after the individual case has been concluded, reversal of the class action will necessitate a retrial of the substantive case

following an additional period for discovery on the class claims. See e.g., Rich v. Martin Marietta Corp., supra. The unavailability of an immediate appeal will result in an inordinate waste of time by the already overburdened district courts, will escalate the expense of litigation, and will seriously undermine the policy behind Fed. R. Civ. P. 23, i.e., to promote the efficient administration of federal actions. An interlocutory appeal of the order denying class action status will facilitate the ultimate termination of the action on the merits.

Thus, were this Court to balance the competing considerations which it has identified in ruling on appeals brought pursuant to 28 U.S.C. § 1291, Gillespie v. United States Steel Corp., supra, it is evident that in the instant case the danger of denying justice by delay far outweights the inconvenience of interlocutory review. This is especially true herein because substantive rights can well be lost, Congressional policy will be contravened, and review may be totally foreclosed should

Gardner not prevail in her individual case. The Third Circuit erred in failing to consider the consequences of the nonappealability of Judge McCune's order.

F. 28 U.S.C. § 1292(a)(1) Encompasses Orders Effectively Denying Permanent Injunctive Relief

The absence of a request for a preliminary injunction in the complaint filed in this case does not defeat appealability pursuant to 28 U.S.C. § 1292(a)(1). Interlocutory orders can encompass denials of permanent injunctions.17/

In Baltimore Contractors, Inc., supra, this Court noted the absence of legislative history on the Evarts Act, the predecessor of the present 28 U.S.C. § 1292(a)(1). However, the statute, since its enactment in 1891 and throughout subsequent revisions in language,

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17/ Contrast this with the language of 28 U.S.C. § 1253 as construed in Goldstein v. Cox, supra, which statute contained language limiting this Court's interlocutory appellate jurisdiction to preliminary injunction orders.

has always referred simply to injunctions and has never specified either permanent or preliminary injunctions.

This Court has consistently held the grant or denial of a permanent injunction to be appealable. In John Simmons Co. v. Grier Brothers Co., 258 U.S. 82 (1922), the Court held:

> "...But an examination of the record demonstrates that they correctly described the decree as interlocutory.
>
> "The decree of July 24, 1914, although following a 'final hearing', was not a final decree. It granted to plaintiffs a permanent injunction upon both grounds, but an accounting was necessary to bring the suit to a conclusion upon the merits. An appeal taken to the Circuit Court of Appeals, whose jurisdiction, under Section 129, Judicial Code (Comp. St. § 1121), extended to the revision of interlocutory decrees granting injunctions, followed by the decision of that court reversing in part and affirming in part, did not result in a decree more final than the one reviewed. ..." Id. at 89.[18]

18/ However, noting that the appeal had not been timely taken this Court dismissed it.

In George supra, a decree granting an injunction against patent infringement and appointing a special master to make an accounting was found to be appealable.

In Switzerland Cheese, supra, this Court stated that an interlocutory order could embrace the denial of a permanent injunction.

Most recently, in Liberty Mutual Insurance Co. v. Wetzel, supra, Mr. Justice Rehnquist held, in a case where, like the instant case, relief was sought enjoining discriminatory employment practices, that the grant of such an injunction would have been appealable pursuant to 28 U.S.C. §1292(a)(1). The Wetzel decision has been cited and followed by United States Court of Appeals for the Fifth Circuit in McGill v. Parsons, 532 F.2d 484, 485 (5th Cir. 1976) at n. 1. Other circuits have also expressly found the denial of a permanent injunction to be an appealable interlocutory orders pursuant to 28 U.S.C. §1292(a)(1). Reed v. Rhodes, 549

F.2d 1050 (6th Cir. 1976); Equal Employment Opportunity Commission v. International Longshoremen's Association, 511 F.2d 273 (5th Cir. 1975); Fidelity Trust Co. v. Board of Education of City of Chicago, 174 F.2d 642 (7th Cir. 1949).

VIII.

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully prayed that this Honorable Court reverse or vacate the judgment of the United States Court of Appeals for the Third Circuit, and remand this case to the said Court with directions to decide the appeal on its merits.

Respectfully submitted,

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APPENDIX TO BRIEF

Rule 23. Class Actions.

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall

include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the

class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on interveners; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.